

NOTICE OF PROPOSED RULEMAKING
AMENDMENTS TO TITLE 23, CA CODE OF REGULATIONS REGARDING
CHANGES RELATED TO AB 5 AND TECHNICAL UPDATES

NATURE OF PROCEEDING

NOTICE IS HEREBY GIVEN that the Central Valley Flood Protection Board (CVFPB) proposes to amend the following Sections in Division 1, Chapter 1 of Title 23, California Code of Regulations:

Section 1 (Authority)

Section 3 (Intent)

Section 4 (Definitions)

Section 5 (Delegations)

Section 6 (Need for a Permit)

Section 7 (Endorsement by Local Maintaining Agency)

Section 8 (Applications)

Section 13 (Hearings)

Section 15 (Bases for Denial of Application)

Section 112, Table 8.1 (Regulated Streams and Non-Permissible Work Periods)

Section 109 (Right of Review of Delegated Authority)

Section 120(a)(5) (Levees)

Section 193, Appendix A (Applications for Encroachment Permits)

In addition, CVFPB proposes to add the following new sections to Division 1, Chapter 1 of Title 23, California Code of Regulations:

Section 5.1 (Ex Parte Communications)

Section 13.1 (Conduct and Order of Evidentiary Hearing Proceedings)

Section 13.2 (Consent Calendar)

Section 138 (Identification of Limits of Flood Control Works)

PUBLIC PROCEEDINGS

A public hearing regarding this proposal is not currently scheduled. However, any interested person or duly authorized representative may request, no later than 15 days prior to the close of the written comment period that a public hearing be scheduled.

Following the public hearing, if one is requested, or following the written comment period, if no public hearing is requested, the CVFPB may thereafter adopt the proposals substantially as described herein and in the Initial Statement of Reasons or may modify the proposals if the modifications are substantially related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written comments related to this proposal, or who provide oral testimony if a public hearing is held, or who have requested notification of any changes to the proposal.

Notice is also given that any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to

Dan S. Fua, P.E., Supervising Engineer
Central Valley Flood Protection Board
3310 El Camino Ave., Room LL40
Sacramento, CA 95821

Comments may also be submitted by facsimile (FAX) at (916) 574-0682 or by e-mail to lpndleb@water.ca.gov. Comments must be submitted prior to 5:00 p.m. on January 26, 2009.

AUTHORITY AND REFERENCE

Assembly Bill 5 (AB 5) took effect on January 1, 2008, and was codified in relevant part at Water Code sections 8521, 8550, 8551, 8578, and 8610.5. AB 5 reconstituted and renamed the Reclamation Board to the "Central Valley Flood Protection Board," imposed new ex parte rules, and mandated the Board to adopt regulations related to evidentiary hearings. In addition, the CVFPB's authorities relevant to the subject matter of the proposed regulations are generally stated in Water Code sections 8534, 8608, and 8710-8723.

Pursuant to the authority vested by Water Code sections 8571 and 8610.5, CVFPB is considering changes to Division 1 of Title 23 of the California Code of Regulations. These proposed regulations will implement, interpret, or make specific Water Code sections 8521, 8534, 8550, 8551, 8578, 8608, 8610.5, and 8710-8723.

INFORMATIVE DIGEST:

Assembly Bill 5 (AB 5) took effect on January 1, 2008, and was codified in relevant part at Water Code sections 8521, 8550, 8551, 8578, and 8610.5. Among many changes, AB 5 reconstituted and renamed the Reclamation Board to the "Central Valley Flood Protection Board." The new legislation also imposes new ex parte rules and requires the Board to hold

evidentiary hearings on all matters requiring the issuance of a permit. Water Code section 8610.5(a)(1) states that "The board shall adopt regulations relating to evidentiary hearings pursuant to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code."

Pursuant to the authority vested by Water Code sections 8571 and 8610.5, the purpose of the proposed rulemaking is to provide the regulations required by Water Code section 8610.5 regarding evidentiary hearings in accordance with Legislative intent. In addition, pursuant to authority vested by Water Code section 8571, the regulations will implement, interpret, or make specific the new legislation. The proposed rulemaking also makes several substantive and non-substantive changes in order to make the current regulations consistent with the new legislation.

In addition to making changes related to AB 5, the purpose of the proposed rulemaking is to update the regulations to fix typographical errors and omissions, as well as to bring the regulations into conformance with current Board procedures. CVFPB's authorities relevant to the subject matter of the proposed regulations are generally stated in Water Code sections 8534, 8608, and 8710-8723. Pursuant to the authority vested by Water Code section 8571, CVFPB proposes changes to Division 1 of Title 23 of the California Code of Regulations. These proposed regulations will implement, interpret, or make specific Water Code sections 8534, 8608, and 8710-8723.

EFFECT ON SMALL BUSINESSES

The proposed regulatory action will not affect small businesses because the proposed regulations primarily clarify new laws imposed on the CVFPB and fix typographic errors.

IMPACT ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The proposed regulatory action would not impose a mandate on local agencies or school districts; nor does it require reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. No nondiscretionary costs or savings to local agencies or school districts are anticipated to result from the proposed regulatory action.

COSTS OR SAVINGS TO STATE AGENCIES

No savings or increased costs to State agencies are anticipated.

EFFECT ON FEDERAL FUNDING TO THE STATE

No effect on federal funding to the State is anticipated.

EFFECT ON HOUSING COSTS

No effect on housing costs is anticipated.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE

CVFPB has made an initial determination that the adoption of these regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposed regulations primarily clarify new laws imposed on the CVFPB and fix typographic errors. Two of the proposed regulations (Sections 120(a)(5) and 138) are related to easements and give the Board the ability to create greater flood protection, and arguably protect businesses in those areas.

IMPACT ON THE CREATION, ELIMINATION, OR EXPANSION OF JOBS/BUSINESSES

CVFPB has determined that the regulatory proposal will not have any impact on the creation or elimination of jobs, the creation of new businesses, or the elimination of existing businesses, or the expansion of businesses currently doing business within the State of California.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulations.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), CVFPB must determine that no reasonable alternative considered by CVFPB, or that has otherwise been identified and brought to the attention of CVFPB, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

CVFPB has prepared and has available for public review an Initial Statement of Reasons for the proposed regulations, all the critical information upon which the regulation is based, and the text of the proposed regulations. A copy of the Initial Statement of Reasons and a copy of the proposed text are available upon request from Lorraine Pendlebury at the e-mail address listed above, or by calling (916) 574-0609. These documents are posted at CVFPB's website at www.cvfpb.ca.gov.

CONTACT PERSONS

Inquiries concerning the proposed regulations may be directed to:

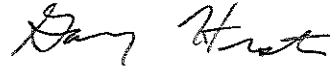
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3310 El Camino Ave., Room LL40
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dfua@water.ca.gov

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Central Valley Flood Protection Board
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lpendleb@water.ca.gov

FINAL STATEMENT OF REASONS

A copy of the Final Statement of Reasons may be obtained, when it becomes available, from Lorraine Pendlebury at the e-mail address and telephone number indicated above. The Final Statement of Reasons will also be available at the CVFPB's website at www.cvfpb.ca.gov.

CENTRAL VALLEY FLOOD
PROTECTION BOARD



Gary Hester, Acting Executive Officer

Dated: Dec 7, 2008

**ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)**

STD. 399 (Rev. 2-98)

See SAM Sections 6600 - 6680 for Instructions and Code Citations

DEPARTMENT NAME Central Valley Flood Protection Board	CONTACT PERSON Dan Fua	TELEPHONE NUMBER (916) 574-0698
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400 Amendments Related to AB 5 & Technical Updates		NOTICE FILE NUMBER Z

ECONOMIC IMPACT STATEMENT**A. ESTIMATED PRIVATE SECTOR COST IMPACTS** (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

☐ a. Impacts businesses and/or employees☐ e. Imposes reporting requirements☐ b. Impacts small businesses☐ f. Imposes prescriptive instead of performance standards☐ c. Impacts jobs or occupations☐ g. Impacts individuals☐ d. Impacts California competitiveness☒ h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) _____

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

3. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

4. Indicate the geographic extent of impacts: ☐ Statewide ☐ Local or regional (list areas): _____

5. Enter the number of jobs created: _____ or eliminated: _____ Describe the types of jobs or occupations impacted: _____

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

☐ Yes☒ No

If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? \$ 0

a. Initial costs for a small business: \$ _____

Annual ongoing costs: \$ _____

Years: _____

b. Initial costs for a typical business: \$ _____

Annual ongoing costs: \$ _____

Years: _____

c. Initial costs for an individual: \$ _____

Annual ongoing costs: \$ _____

Years: _____

d. Describe other economic costs that may occur: _____

ECONOMIC AND FISCAL IMPACT STATEMENT *cont.* (STD. 399, Rev. 2-98)

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. *(Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.):* \$ _____

4. Will this regulation directly impact housing costs? ☐ Yes ☒ No If yes, enter the annual dollar cost per housing unit: \$ _____ and the number of units: _____

5. Are there comparable Federal regulations? ☐ Yes ☒ No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: \$ _____

C. ESTIMATED BENEFITS *(Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)*

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

2. Are the benefits the result of: ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? \$ _____

D. ALTERNATIVES TO THE REGULATION *(Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)*

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: Comments were considered at a public meeting at which no reasonable alternatives were brought to the attention of the agency which would be more effective or as effective and less burdensome to affected private persons than the proposed action.

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: \$ _____	Cost: \$ _____
Alternative 1:	Benefit: \$ _____	Cost: \$ _____
Alternative 2:	Benefit: \$ _____	Cost: \$ _____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ Yes ☐ No

Explain: N/A

E. MAJOR REGULATIONS *(Include calculations and assumptions in the rulemaking record.)*

Cal/EPA boards, offices and departments are subject to the following additional requirements per Health and Safety Code section 57005.

ECONOMIC AND FISCAL IMPACT STATEMENT *cont.* (STD. 399, Rev. 2-98)

1. Will the estimated costs of this regulation to California business enterprises exceed \$10 million? ☐ Yes ☐ No *(If No, skip the rest of this section)*

2. Briefly describe each equally as effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: \$ _____ Cost-effectiveness ratio: _____

Alternative 1: \$ _____ Cost-effectiveness ratio: _____

Alternative 2: \$ _____ Cost-effectiveness ratio: _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT *(Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years)*

☐ 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

☐ a. is provided in (Item _____, Budget Act of _____) or (Chapter _____, Statutes of _____)

☐ b. will be requested in the _____ Governor's Budget for appropriation in Budget Act of _____
(FISCAL YEAR)

☐ 2. Additional expenditures of approximately \$ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

☐ a. implements the Federal mandate contained in _____

☐ b. implements the court mandate set forth by the _____
court in the case of _____ vs. _____

☐ c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____
election; (DATE)

☐ d. is issued only in response to a specific request from the _____
_____, which is/are the only local entity(s) affected;

☐ e. will be fully financed from the _____ authorized by Section _____
(FEES, REVENUE, ETC.)
_____ of the _____ Code;

☐ f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit.

☐ 3. Savings of approximately \$ _____ annually.

☒ 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law and regulations.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 2-98)

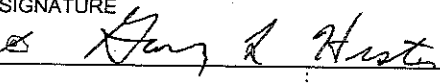


- ☐ 5. No fiscal impact exists because this regulation does not affect any local entity or program.
- ☒ 6. Other.

B. FISCAL EFFECT ON STATE GOVERNMENT *(Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)*

- ☐ 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year. It is anticipated that State agencies will:
- ☐ a. be able to absorb these additional costs within their existing budgets and resources.
- ☐ b. request an increase in the currently authorized budget level for the _____ fiscal year.
- ☐ 2. Savings of approximately \$ _____ in the current State Fiscal Year.
- ☐ 3. No fiscal impact exists because this regulation does not affect any State agency or program.
- ☒ 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS *(Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)*

- ☐ 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year.
- ☐ 2. Savings of approximately \$ _____ in the current State Fiscal Year.
- ☒ 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.
- ☐ 4. Other.

SIGNATURE		TITLE
 Gary L. Hester		12/2/08 Acting Executive Officer
AGENCY SECRETARY ¹		DATE
APPROVAL/CONCURRENCE		
DEPARTMENT OF FINANCE ²	PROGRAM BUDGET MANAGER	DATE
APPROVAL/CONCURRENCE		

1. The signature attests that the agency has completed the STD. 399 according to the instructions in SAM sections 6600-6680, and understands the impacts of the proposed rulemaking. State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization.
2. Finance approval and signature is required when SAM sections 6600-6670 require completion of the Fiscal Impact Statement in the STD. 399.

STATE OF CALIFORNIA
CENTRAL VALLEY FLOOD PROTECTION BOARD

3310 EL CAMINO AVENUE, RM. LL40 (JOC)

SACRAMENTO, CA 95821

DIVISION 1, CHAPTER 1, OF THE CALIFORNIA CODE OF REGULATIONS
REGARDING CHANGES RELATED TO AB 5 AND TECHNICAL UPDATES

INITIAL STATEMENT OF REASONS

INTRODUCTION

Assembly Bill 5 (AB 5) took effect on January 1, 2008, and was codified in relevant part at Water Code sections 8521, 8550, 8551, 8578, and 8610.5. Among many changes, AB 5 reconstituted and renamed the Reclamation Board to the "Central Valley Flood Protection Board." The new legislation also imposes new ex parte rules and requires the Board to hold evidentiary hearings on all matters requiring the issuance of a permit. Water Code section 8610.5(a)(1) states that "The board shall adopt regulations relating to evidentiary hearings pursuant to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code."

Pursuant to the authority vested by Water Code section 8571 and 8610.5, the purpose of the proposed rulemaking is to provide the regulations required by Water Code section 8610.5 regarding evidentiary hearings in accordance with Legislative intent. In addition, pursuant to authority vested by Water Code section 8571, the regulations will implement, interpret, or make specific the new legislation. The proposed rulemaking also makes several substantive and non-substantive changes in order to make the current regulations consistent with the new legislation.

In addition to making changes related to AB 5, the purpose of the proposed rulemaking is to update the regulations to fix typographical errors and omissions, as well as to bring the regulations into conformance with current Board procedures. CVFPB's authorities relevant to the subject matter of the proposed regulations are generally stated in Water Code sections 8534, 8608, and 8710-8723. Pursuant to the authority vested by Water Code section 8571, CVFPB proposes changes to Division 1 of Title 23 of the California Code of Regulations. These proposed regulations will implement, interpret, or make specific Water Code sections 8534, 8608, and 8710-8723.

The following discussion describes the specific purpose of each section of the proposed regulations and why it is necessary:

Proposed Amendment to Section 1 (Authority): This amendment reflects the name change of the Board from the "Reclamation Board" to the "Central Valley Flood Protection Board," to be consistent with AB 5.

Proposed Amendment to Section 3 (Intent): This amendment includes non-substantive changes. In subsection 4, "and" has been deleted and replaced with "the" to correct a grammatical error in the original regulations.

Proposed Amendment to Section 4 (Definitions): In subsection (a)(1), this amendment deletes the reference to Article 5, Designated Floodway in the definition of an Adopted Plan of Flood Control in a project flood channel without levees, because the reference does not assist in the understanding of an "Adopted Plan of Flood Control" and can lead to confusion. In subsection (a)(3), language is added to clarify that boundary lines and encroachment lines are interchangeable terms for the purposes of the section. In subsection (a)(4), language has been added to clarify that where levees are involved, an "Adopted Plan of Flood Control" may extend more than ten (10) feet from the toe of a levee. In subsection (c) the amendment reflects name change of the Board from the "Reclamation Board" to the "Central Valley Flood Protection Board," to be consistent with AB 5.

Proposed Amendment to Section 5 (Delegations): This amendment specifies the circumstances in which the Board may delegate duties to the Executive Officer (formerly titled the General Manager), the Director of the Department of Water Resources, and others. AB 5, as codified at Water Code section 8610.5, states that the Board shall hold an evidentiary hearing for all matters requiring the issuance of a permit. Because the current regulation allows the Executive Officer to approve permit applications, it is inconsistent with the new legislation. However, AB 5 does not preclude all matters from being delegated to the Executive Officer. Therefore, the language has been updated to reflect which "matters" may still be delegated. No substantive changes have been made except to delete the section relating to matters involving bicycle trails on levees. No law requires that all matters involving bicycle trails on levees be approved by the Board. Additionally, the current language in subsection (b) may erroneously be interpreted to allow the Executive Officer to approve Environmental Impact Reports. Since the Board is the decision-making body for purposes of the California Environmental Quality Act, the Board is the proper body to approve Environmental Impact Reports. Therefore, language has been added to clarify that the Executive Officer may only distribute, not approve, draft environmental impact reports. Finally, CVFPB and DWR are in the process of executing a new Memorandum of Agreement which will reflect the relationship between the two agencies in light of the new legislation. Accordingly, subsections (b) and (c) have been reorganized to clarify that the Board may make delegations to the Executive Officer, the Director of the Department, or others by resolution or written agreement.

Proposed New Section 5.1 (Ex Parte Communications): This amendment proposes to add a new Chapter (2.5) and section to implement, interpret, and make specific the new ex parte rules of AB 5, as codified in Water Code section 8578. The amendment specifies what types of communications are subject to the prohibition against ex parte communications, as well as how a Board member can comply with the reporting requirements of the new legislation in the event an ex parte communication occurs.

First, the new ex parte rules enacted by AB 5 do not specifically state when the prohibition against ex parte communications attaches. Regulations are necessary to clarify when the prohibition attaches so that Board members and the public can conduct business with a level of certainty. The amendments to Title 23 were chosen because they provide guidance to the Board members and the public regarding when a communication is considered to be an ex parte communication, while remaining sufficiently flexible to encompass future unforeseen circumstances. Similarly, the proposed amendments are necessary to clarify when a matter is no longer "under the board's jurisdiction" and therefore no longer subject to the prohibition. The amendment clarifies that the prohibition against ex parte communications no longer applies after the Board votes on the application and the thirty-day time period for reconsideration pursuant to section 23 of the regulations has expired. This amendment mirrors the language of other agencies with similar ex parte rules.

Second, many of the matters subject to a vote by the Board involve the construction of levees and other flood control works, sometimes necessitating a site visit by one or more members of the Board. After the enactment of AB 5, the question has arisen whether a field trip to a site constitutes an ex parte communication. Therefore, language has been added to the amendments that specifies under what circumstances a Board member may participate in a field trip when the ex parte rules attach. The amendments were chosen because an ex parte communication is only ex parte if the opposing party has not received notice of the communication. Here, advance notice is given. In addition, the Bagley-Keene public meeting law requires ten days' public notice before a meeting of more than a quorum of the Board may take place. Therefore, the amendments also comply with the public meeting law requirement in the event a quorum of the Board members wish to attend the field trip.

Third, the new ex parte rules enacted by AB 5 state that communications cease to be ex parte communications when the Board member or the person who engaged in the communication with the Board member fully discloses the communication and requests in writing that it be placed in the Board's official record of the proceeding. However, AB 5 does not specify when or how this disclosure should take place. Therefore, language has been added specifying how the disclosure requirement of AB 5 can be met. The amendments were chosen because the Executive Officer is the logical person to maintain copies of written ex parte communications for inclusion in the record of proceedings. The amendment also states that the disclosure shall occur prior to or at the same time that the Board considers the matter that was the subject of the communication. This is consistent with the statement in AB 5 that in order for the communication to cease being an ex parte communication, the communication should be made a part of the official record of proceedings.

Proposed Amendment to Section 6 (Need for a Permit): This amendment reflects the name change of the Board's manager from the "General Manager" to the "Executive Officer," to be consistent with AB 5.

Proposed Amendment to Section 7 (Endorsement by Local Maintaining Agency): This amendment deletes the word "Local" in the title of the section because a maintaining agency can be a state agency, such as the Department of Water Resources. The word "state" is added to subsection (b) to demonstrate that a state agency may be the maintaining agency. Subsection (d), which exempts the Department of Water Resources from the requirement of endorsing a project when it is the agency responsible for maintenance of the levee, is deleted because the Board will be required to solicit an endorsement or denial of a permit application from the Department of Water Resources when it is the maintaining agency.

Proposed Amendment to Section 8 (Applications): The amendment to subsection (a) notes that while there is a standard application form for most projects, this section gives the Board the authority to accept permit applications on forms that are different from the standard Board application form. It is anticipated that a joint permit application form could be used by applicants when the form contains all information required by the Board and the Board has pre-approved its use. The intent of this section is to simplify and streamline the permitting process for applicants who need permits from more than one state agency for one particular project. The amendment to subsection (b)(5) clarifies that the names and addresses of all landowners of both the landowners of the property on which the projects is located and all adjacent landowners are required.

Proposed Amendment to Section 13 (Hearings): This amendment proposes to amend the existing regulations in order to implement, interpret, and make specific the new rules related to evidentiary hearings adopted by the Legislature in AB 5, as codified in Water Code section 8610.5. Water Code section 8610.5(a)(1) states that "The board shall adopt regulations relating to evidentiary hearings pursuant to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code." Water Code section 8610.5(a)(2) states that the Board shall hold an evidentiary hearing for all matters requiring the issuance of a permit. This alters past Board procedure, which allowed the Executive Officer (formerly General Manager) to issue permits without a hearing.

Because the current regulation allows the Executive Officer to approve permits under certain circumstances, it is inconsistent with the new legislation. The amendment specifies that an evidentiary hearing shall be held for any matter that requires the issuance of a permit. The amendment also establishes procedures related to evidentiary hearings. It specifies the procedure to be used if the Board appoints a hearing officer, the information that must be included in the required written notice of the hearing, and incorporates new sections 13.1 (related to the conduct and order of evidentiary hearings) and 13.2 (related to consent calendar). Language has also been added for the procedure for the Board to review the decision of appointed hearing officers. The procedures are needed in order to clarify when a decision on a permit becomes final. In addition, language has been added to clarify that the "issuance of a permit" means its initial issuance and not subsequent minor modifications or alterations to an existing permit, even if it is given a new permit number.

These amendments were chosen because they incorporate and implement the informal hearing requirements and Bill of Rights in Chapter 4.5 of the Administrative Procedure Act ("APA") (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code. The regulations from other State agencies having similar functions as the Board were also consulted in drafting these regulations, including the Coastal Commission, State Water Resources Control Board, Integrated Waste Management Board, and San Francisco Bay Conservation and Development Commission.

Proposed New Section 13.1 (Conduct and Order of Evidentiary Hearing Proceedings):

This amendment provides clarification regarding the procedures for evidentiary hearings pursuant to Section 13, above. The procedures provide the regulations required by Water Code section 8610.5 regarding evidentiary hearings in accordance with Legislative intent. The amendment requires that the evidentiary hearing be held in open session and that public testimony follow a pre-set order. This allows all interested parties an opportunity to present and rebut evidence before the Board or appointed hearing officer votes on the application in accordance with the APA's Bill of Rights in Government Code section 11425.10. The amendment also specifies what kind of evidence can be considered, and how that evidence is to be presented. These regulations are needed to make the Board's evidentiary hearings efficient and so that applicants and the public are on notice of what will be expected of them when they participate in an evidentiary hearing before the Board. Clear guidelines regarding the admission of evidence are also necessary to create a complete record of the Board's proceedings in the event an action is subject to legal challenge. The APA's Bill of Rights requires that the decision be based upon written conclusions. Typically, staff members of the CVFPB provide a staff report to the Board outlining their recommended findings and conclusions. However, because the Board may come to a different conclusion or conclusions than those presented by the staff report, procedures are also necessary to clarify how the Board may adopt written conclusions that are different than those presented in the staff report. The amendments also make clear when a decision on an evidentiary hearing is final for purposes of judicial review.

The procedures presented by the proposed amendments reflect procedures that comply with due process, Water Code section 8610.5, and the APA informal hearing requirements and Bill of Rights. They are also similar to the regulations of other State agencies having similar functions as the Board, including the Coastal Commission, Integrated Waste Management Board, and San Francisco Bay Conservation and Development Commission.

Proposed New Section 13.2 (Consent Calendar): The CVFPB reviews approximately two hundred permits annually. Prior to AB 5, the majority of these permits were reviewed and approved by the Executive Officer. After AB 5, all permits must be reviewed by the Board during its monthly meetings. In order to streamline the hearing requirement, regulations specifically providing for a consent calendar have been added. This amendment specifies the procedures for the consent calendar. The amendment states that an item can only be voted on as a part of the consent calendar if the Board accepts the staff report with no substantial changes. The applicant, any member of the public, or any Board member may remove the item from the consent calendar; therefore, the amendment provides an opportunity to present and rebut evidence prior to the Board decision. Written conclusions supporting the decision are still required. Therefore, consent calendar items incorporate the requirements of Sections 13 and

13.1, but serve to expedite the process for permit applications that are non-controversial and that have no known opposition.

Proposed Amendment to Section 15 (Bases for Denial of Applications): AB 5, as codified at Water Code section 8610.5(c), states that in any evidentiary hearing the Board shall consider, among other things, the “[e]ffects of the proposed decision on the entire State Plan of Flood Control.” Water Code section 8523, also a new section effective January 1, 2008, defines “State Plan of Flood Control” as “the state and federal flood control works, lands, programs, plans, policies, conditions, and mode of maintenance and operations of the Sacramento River Flood Control Project described in Section 8350, and of flood control projects in the Sacramento River and San Joaquin River watersheds authorized pursuant to Article 2 (commencing with Section 12648) of Chapter 2 of Part 6 of Division 6 for which the board or the department has provided the assurances of nonfederal cooperation to the United States, and those facilities identified in Section 8361.” The current Section 15 of Title 23 specifies the circumstances in which the Board may deny a permit. Because AB 5 requires the Board to consider the effects of the permit application on the State Plan of Flood Control, the amendment also grants the Board the authority to deny a permit if the permit could adversely affect the State Plan of Flood Control. Without the authority to deny the permit based upon potentially adverse findings under Water Code section 8610.5(c), the requirement that the Board review those potential effects is arguably meaningless.

Proposed Amendment to Section 109 (Right of Review of Delegated Authority): This amendment is being updated to reflect AB 5’s change in the title of “General Manager” to “Executive Officer.” Additionally, CVFPB and DWR are in the process of executing a new Memorandum of Agreement which will reflect the relationship between the two agencies in light of the new legislation. Accordingly, this amendment deletes the reference to previous Resolution No. 94-15 dated September 16, 1994.

Proposed Amendments to Section 112, Table 8.1 (Regulated Streams and Nonpermissible Work Periods): These amendments are necessary to correct boundary description limits of regulated streams and floodways, including the name of the counties where the streams are located. The amendments also include adding streams and creeks within the adopted designated floodways that were inadvertently left out and deleting streams and creeks that are outside the Board’s adopted designated floodways.

Proposed Amendments to Section 120 (Levees): These amendments are necessary to allow the Board to require an easement that is necessary to regulate the flood control interest of the Central Valley Flood Protection Board. Under this change, easements may be required for maintenance, operation, flood fights, flowage, excavation or other reasons to the extent such easements are necessary to prevent the proposed activities subject to a permit from resulting in an effect that is injurious to or interferes with the adopted plan of flood control.

Proposed New section 138 (Identification of Limits of Flood Control Works): This amendment gives the Central Valley Flood Protection Board the ability to define the limits of the Board's regulatory interest within the Sacramento or San Joaquin Rivers' bed and banks or any of their tributaries, adjacent land, overflow basins or any land susceptible to overflow of the Sacramento or San Joaquin Rivers. The easement will be determined in accordance with the Board's jurisdiction to approve plans of reclamation, flood control, drainage, improvement, dredging or work within the Sacramento or San Joaquin Rivers' bed or banks or any of their tributaries, adjacent land, overflow basins or any land susceptible to overflow of the Sacramento or San Joaquin Rivers. This section is necessary for the Board to execute its regulatory authority by allowing the Board to accurately delineate the area the Board determines it regulates for flood control purposes and then memorialize that determination through an easement. The amendment also allows the Board to determine the limits of its jurisdiction when an applicant requests permission from the Board to tie or join their project into a levee regulated by the Board by means of the placement of fill. The proposed section would also address the situation in which the Board must define the easement for purposes of installation of a pump or other flood features or facilities necessary to improve the functioning of the flood control system. This section would also address situations in which the placement of dredge or other material has obscured or buried the original intersection of the project levee with the natural ground.

Proposed Amendment to Section 193, Appendix A (Application for Encroachment Permit): This amendment proposes creating a new article labelled, "Appendices." The amendment allows the appendix, general information regarding applications for encroachment permits, to be current with the amended regulations. The Board's name is changed from the "Reclamation Board" to the "Central Valley Flood Protection Board" throughout the appendix. The address is changed to be consistent with the current Board address.

Specific changes to the third paragraph include an update to the explanation of the Board's easement requirement, which is now at least ten feet rather than limited to ten feet to be consistent with the amendment to section 120(a)(5). In the same sentence, the word "areas" is added to the explanation of the Board's jurisdiction over unleveed project channels to make the sentence clearer.

In number 4 of the fourth paragraph, "district" is changed to "agency." The purpose of this amendment is to be consistent with section 7 of the regulations, where the entity responsible for levee maintenance is referred to as the "maintaining agency."

New number 10 in the fourth paragraph is added to provide the name and address of the property owners on which the proposed project is located in order for appendix A to be consistent with the amendments to section 8 of the regulations.

Additionally, in the application processing section, the current regulations state that the majority of applications filed are approved by the Board's General Manager. This is no longer accurate because AB 5 requires all permit applications to be reviewed by the Board. Accordingly, this language has been deleted.

SPECIAL CONSIDERATIONS:

A rulemaking agency must find that no alternative would be more effective in carrying out the purpose for which a regulation is proposed or would be as effective as and less burdensome to affected private persons than the adopted regulation. The CVFPB held a public meeting for interested persons prior to the drafting of this Initial Statement of Reasons. The CVFPB considered and incorporated, where appropriate, the suggestions made during that public meeting. No alternative proposed by interested persons or otherwise considered by the CVFPB has been determined to be either more effective in carrying out the purpose for which the regulations are proposed or as effective as and less burdensome to affected private persons.

A rulemaking agency must also do the following:

- 1) Determine whether the proposed regulation "may have," or "will not have" a significant, statewide adverse impact directly affecting business. The agency must solicit alternatives if it "may have";
- 2) Describe the potential cost impact of a proposed regulation on a representative private person or business, if known;
- 3) Assess whether and to what extent the proposed regulation will create or eliminate jobs or businesses;
- 4) Find that any business reporting requirement is necessary for the public health, safety, or welfare; and
- 5) State whether a proposed regulation affects small business.

Discussion:

The proposed regulations primarily clarify new laws imposed on the CVFPB by new legislation effective January 1, 2008 (AB 5) and fix typographic errors. Most of the amendments do not impose any new requirements upon private persons or businesses, but rather the Board and its staff. Sections 13 and 13.1 set out procedural requirements for the conduct of hearings. However, these amendments do not impose new substantive requirements upon private persons or businesses. Two of the proposed regulations (Sections 120(a)(5) and 138) are related to easements and give the Board the ability to create greater flood protection, and arguably protect businesses in those areas. These regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposal will not have any impact on the creation or elimination of jobs, the creation of new businesses, or the elimination of existing businesses, or the expansion of businesses currently doing business within the State of California. No business reporting requirement is imposed by the proposal.

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-08)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	
AGENCY WITH RULEMAKING AUTHORITY			AGENCY FILE NUMBER (if any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE Amendments Related to AB 5 & Technical Updates		TITLE(S) 23	FIRST SECTION AFFECTED 1	2. REQUESTED PUBLICATION DATE December 12, 2008
3. NOTICE TYPE <input checked="" type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON Dan Fua		TELEPHONE NUMBER (916) 574-0698
OAL USE ONLY		ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		FAX NUMBER (Optional) (916) 574-0682
		NOTICE REGISTER NUMBER		PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)		1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)	
2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)			
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT		
	AMEND		
	REPEAL		
3. TYPE OF FILING			
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346) <input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4) <input type="checkbox"/> Emergency (Gov. Code, §11346.1(b)) <input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute. <input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1) <input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h)) <input type="checkbox"/> File & Print <input type="checkbox"/> Other (Specify) _____ <input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100) <input type="checkbox"/> Print Only			
4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)			
5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective 30th day after filing with Secretary of State <input type="checkbox"/> Effective on filing with Secretary of State <input type="checkbox"/> §100 Changes Without Regulatory Effect <input type="checkbox"/> Effective other (Specify) _____			
6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY			
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660) <input type="checkbox"/> Fair Political Practices Commission <input type="checkbox"/> State Fire Marshal <input type="checkbox"/> Other (Specify) _____			
7. CONTACT PERSON		TELEPHONE NUMBER	FAX NUMBER (Optional)
			E-MAIL ADDRESS (Optional)

8.

I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE

 Gary Hester
 TYPED NAME AND TITLE OF SIGNATORY

12/2/08

Gary Hester, Acting Executive Officer, Central Valley Flood Protection Board

NOTICE PUBLICATION/REGULATIONS SUBMISSION

STD. 400 (REV. 01-08) (REVERSE)

**INSTRUCTIONS FOR PUBLICATION OF NOTICE
AND SUBMISSION OF REGULATIONS**

Use the form STD. 400 for submitting notices for publication and regulations for Office of Administrative Law (OAL) review.

ALL FILINGS

Enter the name of the agency with the rulemaking authority and agency's file number, if any.

NOTICES

Complete Part A when submitting a notice to OAL for publication in the California Regulatory Notice Register. Submit two (2) copies of the STD. 400 with four (4) copies of the notice and, if a notice of proposed regulatory action, one copy each of the complete text of the regulations and the statement of reasons. Upon receipt of the notice, OAL will place a number in the box marked "Notice File Number." If the notice is approved, OAL will return the STD. 400 with a copy of the notice and will check "Approved as Submitted" or "Approved as Modified." If the notice is disapproved or withdrawn, that will also be indicated in the space marked "Action on Proposed Notice." Please submit a new form STD. 400 when resubmitting the notice.

REGULATIONS

When submitting regulations to OAL for review, fill out STD. 400, Part B. Use the form that was previously submitted with the notice of proposed regulatory action which contains the "Notice File Number" assigned, or, if a new STD. 400 is used, please include the previously assigned number in the box marked "Notice File Number." In filling out Part B, be sure to complete the certification including the date signed, the title and typed name of the signatory. The following must be submitted when filing regulations: seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification) and the complete rulemaking file with index and sworn statement. (See Gov. Code § 11347.3 for rulemaking file contents.)

RESUBMITTAL OF DISAPPROVED OR WITHDRAWN REGULATIONS

When resubmitting previously disapproved or withdrawn regulations to OAL for review, use a new STD. 400 and fill out Part B, including the signed certification. Enter the OAL file number(s) of all previously disapproved or withdrawn filings in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). Submit seven (7) copies of the regulation to OAL with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). Be sure to include an index, sworn statement, and (if returned to the agency) the complete rulemaking file. (See Gov. Code §§ 11349.4 and 11347.3 for more specific requirements.)

EMERGENCY REGULATIONS

Fill out only Part B, including the signed certification, and submit seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). (See Gov. Code § 11346.1 for other requirements.)

NOTICE FOLLOWING EMERGENCY ACTION

When submitting a notice of proposed regulatory action after an emergency filing, use a new STD. 400 and complete Part A and insert the OAL file number(s) for the original emergency filing(s) in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). OAL will return the STD. 400 with the notice upon approval or disapproval. If the notice is disapproved, please fill out a new form when resubmitting for publication.

CERTIFICATE OF COMPLIANCE

When filing the certificate of compliance for emergency regulations, fill out Part B, including the signed certification, on the form that was previously submitted with the notice. If a new STD. 400 is used, fill in Part B including the signed certification, and enter the previously assigned notice file number in the box marked "Notice File Number" at the top of the form. The materials indicated in these instructions for "REGULATIONS" must also be submitted.

EMERGENCY REGULATIONS - READOPTION

When submitting previously approved emergency regulations for readoption, use a new STD. 400 and fill out Part B, including the signed certification, and insert the OAL file number(s) related to the original emergency filing in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B).

CHANGES WITHOUT REGULATORY EFFECT

When submitting changes without regulatory effect pursuant to California Code of Regulations, Title 1, section 100, complete Part B, including marking the appropriate box in both B.3. and B.5.

ABBREVIATIONS

Cal. Code Regs. - California Code of Regulations
Gov. Code - Government Code
SAM - State Administrative Manual

For questions regarding this form or the procedure for filing notices or submitting regulations to OAL for review, please contact the Office of Administrative Law Reference Attorney at (916) 323-6815.